before the enactment of section 922(g)(9). Relying on its earlier decision in *United States v. Mitchell*, 209 F.3d 319 (4th Cir. 2000), the Fourth Circuit rejected that argument, *see Ball*, 7 Fed. Appx. 210, 212 (4th Cir. 2001), as well as others, not germane to this petition, and affirmed his conviction. This Court denied his petition for a writ of certiorari on October 1, 2001. *See Ball v. United States*, 534 U.S. 900 (2001).

4. Following the denial of his petition for a writ of certiorari, and while still incarcerated, Petitioner filed a petition for relief pursuant to section 2255. Petitioner identified six Constitutional and statutory errors in his conviction and sentence. As relevant to the instant petition, Petitioner claimed that he was convicted:

- based upon evidence and testimony introduced in violation of the Fifth Amendment;
- in violation of the Ex Post Facto clause; and
- after having received ineffective assistance of counsel in violation of the Sixth Amendment

On the Magistrate's recommendation, *see* Pet. App. 8a-29a, the district court rejected each of these contentions. The district court first rejected Petitioner's contention that his Fifth Amendment rights had been violated. It concluded that the argument had been procedurally defaulted and that, in the alternative, on the merits, Petitioner was not in custody at the time he was interrogated. *Id.* at 5a.

As to Petitioner's Ex Post Facto claim the district court concluded that the issue had been fully addressed on direct appeal. The court rejected Petitioner's argument that the intervening decision by this Court in *Stogner v. California*, 539 U.S. 607 (2003) warranted a different result. *Id.* at 5a-6a.

Finally, with respect to the ineffectiveness claim, the court acknowledged that the *Miranda* claim had not been advanced, but found evidence that counsel had "performed well within the range of competence" required of defense counsel. *Id.* at 6a. Despite the absence of an evidentiary hearing, the magistrate had attributed the failure to develop the *Miranda* claim to a tactical decision by counsel. *Id.* at 19a.

The district court issued a certificate of appealability authorizing an appeal to the Fourth Circuit, limited to the three issues specified. *See* CA App. 162-64.

5. The court of appeals, after argument, summarily affirmed, adopting the reasoning of the district court. *See* Pet. App. 1a-2a. This timely petition followed.

REASONS FOR GRANTING THE WRIT

Two alternate grounds require that this Court grant the petition for review and reverse the decision below. Contrary to the decision of the court of appeals (adopting the reasoning of the district court): 1) Petitioner's conviction violated the Ex Post Facto clause of the Constitution imposing punishment on him for conduct occurring prior to the passage of the criminal statute at issue; and 2) Petitioner received ineffective assistance from his counsel. Both grounds are matters of recurring importance and independently warrant review.

I. Petitioner Was Convicted In Violation Of The Ex Post Facto Clause.

Petitioner's conviction violated the Ex Post Facto clause of the Constitution because it increased the punishment he incurred for his West Virginia battery conviction. The heart of the Ex Post Facto clause, U.S. Const., Art. I, § 9, bars application of a law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (1798) (emphasis deleted). Petitioner challenges the operation of section 922(g)(9) because it applies retroactively to conduct completed before its enactment and because it raises the penalty from what the law provided when he acted. *See California Dept. of Corrections v. Morales*, 514 U.S. 499, 506-07 n. 3 (1995). This issue is one of surpassing importance and continuing applicability (as evidenced, in part, by this Court's recent *Stogner* decision) and review is warranted.

A. Historical Perspective -- To prohibit legislative acts "contrary to the first principles of the social compact and to every principle of sound legislation," The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison), the Framers included a provision they considered to be "perhaps [a] greater security[y] to liberty and republicanism than any [the Constitution] contains." *Id.*, No. 84, at 511 (A. Hamilton). The provision declares: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. Art. I, § 9, cl. 3.

The proscription against ex post facto laws "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder*, 3 Dall. at 390. In *Calder v. Bull*, Justice Chase stated that the necessary explanation is derived from English common law well known to the Framers: "The expressions 'ex post facto laws,' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors." *Id.* at 391; *see also id.* at 389 ("The prohibition * * * very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws."). Specifically, the phrase "ex post facto" referred to certain types of criminal laws. Justice Chase cataloged those types as follows:

> I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390 (emphasis in original).[3]

It is the third category that is at issue in Petitioner's case. The common-law understanding explained by Justice Chase drew heavily upon the authoritative exposition of one of the great scholars of the common law, Richard Wooddeson. *See id.* at 391 (noting reliance on Wooddeson's treatise). Wooddeson's classification divided ex post facto laws into three general categories: those respecting the crimes themselves; those respecting the legal rules of evidence; and those affecting punishment (which he further subdivided into laws creating a punishment and those making an existing punishment more severe). *See* 2 R. Wooddeson, A Systematical View of the Laws of England 625-640 (1792) (Lecture 41).

As particularly relevant to this petition, in the former category Wooddeson included those laws that make "some innovation, or creat[e] some forfeiture or disability, not incurred in the ordinary course of law." *Id.* at 638. As examples of the former category Wooddeson cited the bills passed by Parliament that banished Lord Clarendon in 1669 and Bishop Atterbury in 1723. Those punishments were considered "innovation[s] * * * not incurred in the ordinary course of law" because banishment, at those times, was simply not a form of penalty that could be imposed by the courts. *Id.*; *see also* 11

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[3] Elsewhere in his opinion, Justice Chase described his taxonomy of ex post facto laws as follows:

> Sometimes [ex post facto laws] respected the crime, by declaring acts to be treason, which were not treason, when committed; at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence.

3 Dall. at 389 (emphasis deleted).

W. Holdsworth, A History of English Law 569 (1938); Craies, The Compulsion of Subjects to Leave the Realm, 6 L.Q. Rev. 388, 396 (1890).

This Court has repeatedly endorsed this understanding of the Ex Post Facto clause, (sometimes quoting Chase's words verbatim, sometimes simply paraphrasing). *See e.g., Lynce v. Mathis*, 519 U.S. 433, 441 n. 13 (1997); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Malloy v. South Carolina*, 237 U.S. 180, 183-84 (1915). Thus, it is settled law that retroactive application of an act that inflicts "a greater punishment, than the law annexed to the crime, when committed," is prohibited under the Ex Post Facto clause. *Lynce*, 519 U.S. at 441. So too with a law that imposes an innovative retroactive disability. Such an application implicates "the central concerns of the Ex Post Facto Clause: the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* (quotation omitted).

B. Section 922(g)(9) -- The retroactive imposition of a restriction on Petitioner's right to possess a handgun constitutes such an increased punishment and an innovative and novel disability. Indeed, prior to enactment of section 922(g)(9) the law was so strongly to the contrary that Petitioner's handgun was actually returned to him by the South Charleston police.

In determining whether or not a law imposes new "punishment" this Court has applied a two-part test, first looking to the legislature's intent to determine if punishment was intended, and then determining if the sanction or disability is "punitive in fact" even if not intended as such. *See e.g. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *see also Morales*, 514 U.S. at 507 n.3 (clause prohibits laws which "increase * * * the penalty by which a crime is punished").

Nothing in the legislative history of the adoption of section 922(g)(9) clarifies whether it was intended as a civil or criminal sanction. But resolution of the legislative intent issue is unnecessary because all of the other factors clearly indicate the punitive effect of retroactively imposing a handgun possession

limitation on those previously convicted of a misdemeanor domestic battery. First, the law imposes an "affirmative disability" on prior misdemeanants. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (distinction between penal and regulatory offenses by nature of disability imposed). Second, section 922(g)(9) contains a *scienter* requirement – a clear and historical indication that criminal conduct was the object of the enactment. And, most importantly, section 922(g)(9) is manifestly intended to fulfill the criminal law aim of deterrence. *United States v. Ursery*, 518 U.S. 267, 292 (1996). Thus, retroactively imposing an anti-possession requirement on a battery misdemeanant was clearly intended to impose new punishment of Petitioner. *See United States v. Davis*, 936 F.2d 352 (8th Cir. 1991) (finding Ex Post Facto violation in analogous circumstances).

Assuredly, some courts have reached the contrary conclusion in construing the similar situation posed by the felon-in-possession provisions of section 922(g)(1). *E.g. United States v. O'Neal*, 180 F.3d 115 (4th Cir. 1999). But they have done so on the basis of particular analysis:

> if the past conduct which is made the test of the right to engage in some activity in the future is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed, as it must that the purpose of the statute is to impose an additional penalty for the past conduct. If, however, the past conduct can reasonably be said to indicate unfitness to engage in the future activity the assumption will be otherwise.

Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (quoted in *O'Neal*, 180 F.3d at 123). While it may well be appropriate to say that a prior felony conviction precludes subsequent possession of a firearm because of the felonious nature of the prior conduct at issues, the same cannot be said for a misdemeanor.

Consider that in West Virginia (as in most states) conviction of a felony automatically results in forfeiture of a

defendant's civil rights – including the right to vote and to possess a weapon. And while those rights may be restored, it requires an affirmative act of the State. Thus, felony convictions have long been supposed to carry with them indicia of an unfitness to engage in certain future activity. By contrast misdemeanor convictions, whatever their nature, are historically understood as minor offenses – the classification distinction between misdemeanors and felonies has roots in the common law of over five centuries.

Indeed, it has, until the passage of section 922(g)(9) *never* been the case that one is supposed to have been unfit to engage in future conduct simply by virtue of conviction of a minor offense. Thus, section 922(g)(9) represents a significant earthshaking change in the legal structure – imposing a new and additional punishment in a situation where it had never heretofore existed. And while Congress is eminently entitled to make such a change, the Ex Post Facto clause precludes it having done so retroactively. *Cf. Johnson v. United States*, 529 U.S. 694, 699-700 (2000) (sanctions imposed upon revocation of supervised release based on sanctions enacted after initial sentencing would violate Ex Post Facto clause).

Indeed, the scope of the change is so great that it invalidates the historical practice of the South Charleston police (and, presumably of other police departments around the State). As we have already noted, following the termination of his probation for his West Virginia battery conviction, Petitioner's handgun was returned to him. Thus, effectively, the police restored to him his temporarily rescinded right to possess a firearm. Even the *O'Neal* court expressed doubt about whether a change in law would permit a state to retroactively "strip a [defendant] of his previously restored right to possess firearms." *O'Neal*, 180 F.3d at 121 n.6; *see also United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992) (overturning felon-in-possession conviction based upon previously restored and then rescinded civil rights). That is precisely how section 922(g)(9) operates.

Notwithstanding the forgoing analysis, the lower courts have rejected ex post facto challenges to section 922(g)(9). *See e.g. United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000). In *Mitchell*, the court of appeals reasoned that the provision survived ex post facto analysis because the act that was being punished – continued possession of a firearm – post-dated the enactment of the law. Accordingly, the court concluded that the fact that the misdemeanor conviction and the initial possession of the weapon antedated the passage of the prohibition was irrelevant. *Id.* at 323.

With respect, that conclusion (which underlies the instant Petition) cannot stand. The intervening decision in *Stogner v. California*, 539 U.S. 607 (2003) mandates a different result. *Stogner*, to be sure, involved a different factual situation – there, the Court considered whether a legislative enactment could revive a lapsed statute of limitations – but its teachings are of equal validity in this context.

To see why, one need only recognize the evident similarity between the revival of a lapsed limitations period and the imposition of a post-conviction disability. Both operate with retrospective effect, disrupting settled expectations. For just as one whose limitations period has expired may anticipate repose for his antecedent criminal activity, so too, one whose term of imprisonment has been completed (as Petitioner's had been) can reasonably anticipate repose from the addition of any ancillary, collateral conditions to his finished punishment.

As Justice Breyer wrote in *Stogner* (again relying on Justice Chase's exposition in *Calder*) of the analogous second category of offenses:

> The second category--including any "law that *aggravates a crime*, or makes it *greater* than it was, when committed," [3 Dall.] at 390 -- describes California's statute as long as those words are understood as Justice Chase understood them--*i.e.*, as referring to a statute that "inflict[s] *punishments*, where the party was not, by *law*, liable to *any punishments*" *id.* at 389. See also 2 R. Wooddeson, A Systematical View

> of the Laws of England 638 (1792) * * * (discussing the *ex post facto* status of a law that affects punishment by "making therein some innovation, *or creating some forfeiture or disability, not incurred in the ordinary course of law*" (emphasis added)). After (but not before) the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (when the new law was enacted) did not trigger any such liability.
>
> * * *
>
> So to understand the second category (as applying where a new law inflicts a punishment upon a person not then subject to that punishment, to any degree) explains why and how that category differs from both the first category (making criminal noncriminal behavior) and the third category (aggravating the punishment). And this understanding is consistent, in relevant part, with Chase's second category examples--examples specifically provided to illustrate Chase's *alternative* description of laws "'inflict[ing] *punishments*, where the party was not, by *law*, liable to *any punishment*,'" *Calder*, [3 Dall.] at 389.

Stogner, 539 U.S. at 613-14 (emphasis in original).

Petitioner's situation is precisely parallel (as is that of any other individual subject to the post-conviction operation of section 922(g)(9)). His misdemeanor West Virginia battery conviction was complete. His gun was even returned to him by the police. The post-conviction enactment of section 922(g)(9) acted as a "springing" punishment, arising after all other aspects of Petitioner's punishment had been completed and satisfied. The prohibition on possession of a firearm was a new "forfeiture or disability" not incurred by normal operation of West Virginia law. His term of incarceration having been

completed and his fine paid Petitioner was, at the time of section 922(g)(9)'s passage no longer, "by law, liable for any punishment." The imposition of the new disability was therefore an ex post facto application of law.

In short, we can put it no better than this Court did recently in *INS v. St. Cyr*, 533 U.S. 289 (2001). In considering a challenge to the retroactive application of a law denying an alien defendant certain immigration rights, the Court wrote that the new law:

> "attaches a new disability in respect to transactions or considerations already past." *Landsgraff [v. USI Film Products*, 511 U.S. 244,] 269 [1994]. Plea agreements involve a *quid pro quo* between a defendant and the government. * * * In exchange for some perceived benefit, defendants waive several of their constitutional rights. * * * There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. * * * Given the frequency with which [immigration] relief was granted in the years leading up to [the change in law], preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial.

St. Cyr, 533 U.S. at 291. So, too, with misdemeanants in West Virginia and with Petitioner. Had it been a condition of his original plea agreement in 1995 that he forego his right to possess a firearm, it is more than likely that Petitioner would never have entered into such an agreement.

This, then, is the ultimate ground of Petitioner's ex post facto challenge – the law has changed in a manner that criminalized conduct that: a) he thought otherwise innocent; b) had been bargained for conduct as part of his plea agreement; and c) that he had presumed was lawful because it occurred with the facilitation of the South Charleston police. If this

situation does not call out for invalidation under the Ex Post Facto clause, none does.

C. Default – The ex post facto issue was raised and litigated on direct appeal. However, the prior assertion of the ex post facto issue on appeal does not preclude review in this court because *Stogner* represents a change in law and had not been decided at the time of the earlier proceedings. If the Court accepts our submission as to the effect of *Stogner* then Petitioner's petition is not subject to a procedural bar because the legal basis for his claim was not reasonably available when the matter should have been raised." This Court's decision in *Stogner* constitutes an intervening change in the law (indeed, as discussed above, it compels re-examination of existing Fourth Circuit precedent), and the issue may now be raised in this collateral proceeding. *Cf. Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000) (intervening Supreme Court decision is "cause" for failure to raise issue on direct appeal).

II. Petitioner Received Ineffective Assistance of Counsel.

A. Legal Standards -- The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. "The right of an accused to counsel is beyond question a fundamental right." *See Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Access to competent lawyers is essential to those accused of crimes "because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). The right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Cronic*, 466 U.S. at 657 n.20 (same).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court adopted a two-part test to determine whether a defendant has received ineffective assistance of counsel. First "the defendant must show that counsel's representation fell below

an objective standard of reasonableness." *Id.* at 687; *see e.g. Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989); *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62-63 (3d Cir. 1989). Although the court must give considerable deference to counsel's tactical decisions, "the district court should not * * * construct[ ] a tactical decision counsel might have made but obviously did not." *Washington v. Murray*, 4 F.3d 1285, 1289 (4th Cir. 1993); *see e.g. Griffin v. Warden*, 970 F.2d 1255, 1258 (4th Cir. 1992). Moreover, where counsel makes a tactical decision that is unreasonable, the court should not hesitate to find counsel's performance deficient. *E.g., Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996); *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983).

To be sure, Petitioner's attorney, James M. Cagle Esq., has a well-deserved reputation within the Charleston legal community. That, however, is not dispositive: "It is important to stress that the issue in ineffectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights. * * * Even the best attorney may render ineffective assistance, often for reasons totally extraneous to his or her ability." *United States v. DeCoster*, 487 F.2d 1197, 1202 n.21 (D.C. Cir. 1973).

The second prong of the *Strickland* test is that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692. To satisfy this requirement, the defendant "*need not* show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693 (emphasis supplied). Rather, the defendant need only "show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see e.g., United States v. Peak*, 992 F.2d 39, 41 (4th Cir. 1993). Prejudice may arise not only from what an attorney did, but also from what he failed to do. *See Freeman*, 95 F.3d at 641-43.

B. The Underlying *Miranda* Error -- Petitioner's own statements acknowledging possession of the handgun were admitted during direct trial testimony and used against him. Testimony as to Petitioner's statements was inadmissible because Petitioner had not been provided his *Miranda* warnings.

At trial, the government called Lieutenant Roy Hutchinson to testify. After describing how Petitioner was induced to leave the house, Lt. Hutchinson testified as follows:

> Q. Once Petitioner exited the house, what happened next?
>
> A. We spoke for a period of time in his front yard.
>
> Q. Approximately how long did you spend talking with Petitioner in his front yard?
>
> A. As memory serves, I would say at least half an hour.
>
> Q. Did you discuss a firearm?
>
> A. Yes, sir.
>
> Q. At some point during your discussion, did Petitioner agree to turn the firearm over to you?
>
> A. Yes, sir.
>
> Q. Did he give you permission to retrieve that firearm from his house?
>
> A. Yes, sir.
>
> Q. Did he show you where it was?
>
> A. No, sir. He told me where it was.
>
> Q. Okay. Where did he tell you where it was?
>
> A. He told me it was in his – in a bedroom in the house in a dresser.
>
> Q. Did you retrieve that firearm yourself?
>
> A. Yes, sir.

CA App. 113-14.

As we have already noted, once outside of the house, Petitioner was surrounded by police, *see id.* at 45 (surrounded by 4 officers), and was advised that he would either be arrested or be required to submit to treatment at a local hospital, *see id.* at 49 ("we made it quite clear to him that he was not going to

go back inside the house, and that if he did not go for treatment, then he would be arrested"); *id.* at 56, 69 (Petitioner given two choices – hospital or jail). There can be no doubt that, objectively, Petitioner's freedom of movement had been severely limited and he was, therefore, in custody at this time. *See Stansbury v. California*, 511 U.S. 318 (1994). Because he was not given *Miranda* warnings, *see* CA App. 70, it is an elementary matter of constitutional law that Petitioner's statements to Lt. Hutchinson were inadmissible and subject to suppression.

The appellate court's conclusion to the contrary – that Petitioner was not in custody at the time of his interrogation – is inconsistent with the district court's findings of fact at the time the question of Petitioner's arrest was initially presented in pre-trial hearings. At that time, far closer to the events in question, the district court made it abundantly clear that the officers were the ones controlling the outcome of the interaction with Petitioner – not Petitioner. *See, e.g., id.* at 87 ("The discussion was one having to do with the officers [sic] twin desires, one to obtain the permission of the defendant that they might enter the home to retrieve the gun; and, two, to inform the defendant that he had a choice of either being arrested and taken to jail or going for treatment for his condition to Thomas Memorial Hospital. *The defendant resisted the suggestion that he leave at all.*") (emphasis supplied). Thus, it is manifest, on the record, that Petitioner's will was overborne by the actions of the police officers whom he encountered outside the house.[4]

The only contrary finding by the district court – that Petitioner's consent to the search of his house was voluntary, *see* CA App. 89-90 – is not germane to this Fifth Amendment

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[4] As Petitioner says in the affidavit that accompanied his reply filing in the district court, he was told that he was not free to re-enter his house and that he was not free to leave the house in his car. His only two options were to go to the local hospital for treatment or to go to jail. *See* Affidavit of Kevin E. Ball ¶2, CA App. 127.

question. It goes only to the question (not at issue in this appeal) of whether there was a Fourth Amendment violation.

More importantly, any consideration of "voluntariness" *vel non* is *de jure* irrelevant to the question of Petitioner's Fifth Amendment privilege. The fundamental teaching of *Miranda v. Arizona*, 384 U.S. 436 (1966), reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000), is that custodial interrogations are *presumptively* coercive and that unwarned statements made while in custody can *never* be deemed voluntary. Because of the inherently coercive nature of custodial interrogations only a knowing waiver of the right not to speak *after* being explicitly provided with the requisite *Miranda* warnings can render a custodial statement voluntary.

The *only* relevant question then is whether or not Petitioner was in custody at the time he was questioned – if he was, then the *Miranda* violation is plain on the face of the record. "An officer's obligation to administer *Miranda* warnings attaches * * * where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Oregon v. Mathiason*, 429 U.S. 492 (495 (1977) (internal quotation marks omitted). Whether a suspect is in custody turns on whether there is a "'formal arrest *or* restraint on freedom of movement' of 'the degree associated with a formal arrest.'" *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Mathiason*, 429 U.S. at 495) (emphasis supplied). This inquiry requires a court to examine the totality of the circumstances from the perspective of a reasonable person in the suspect's position. *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984).

In our view, the court's conclusion to the contrary notwithstanding, there can be no doubt that, objectively, Petitioner was in custody, even though he was not arrested. Based on any objective assessment of the situation, *see Stansbury*, 511 U.S. at 322, his freedom of movement had been severely limited. One court has, for example, articulated six separate indicia of whether a suspect is in custody for *Miranda* purposes:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was paced under arrest at the termination of the questioning.

United States v. Brown, 990 F.2d 397, 399 (8th Cir. 1993).

Plainly under this test (or any comparable test) Petitioner was in custody. He was never told that his answering of questions was voluntary. He was expressly told that he was not free to leave. *See* Ball Aff. ¶ 2, CA App.127. As the police themselves testified, he was not free to move about at will during questioning *see* CA App. 49 ("we made it quite clear to him that he was not going to go back inside the house, and that if he did not go for treatment, then he would be arrested"); *id.* at 56, 69 (Petitioner given two choices – hospital or jail). Nor did Petitioner initiate contact with the police; rather Petitioner was given telephonic instructions by the police to leave his house. *See id.* at 86. And manifestly, as Petitioner was surrounded by 4 uniformed police officers, *id.* at 86-87, the police entirely dominated the interrogation arena. The only factor even arguably counseling against a finding that Petitioner was in custody at the time of his interrogation is the fact that he was permitted to go to the hospital rather than be arrested and taken to jail when the interrogation concluded. But that one factor, standing alone, is insufficient to overcome the clear weight of substantial evidence that Petitioner was in "custody" at the time he was interrogated.

And that, of course, determines the question – if Petitioner was in custody then the admission of testimony as to his

statements was plain error. And Petitioner's trial counsel neglected to address the issue in any manner.

The error was manifestly prejudicial. Given the district court's limiting *in limine* ruling, the only real issue at trial was the knowing nature of Petitioner's possession of his handgun. The inadmissible testimony went directly to this *scienter* issue – by acknowledging the location of the gun and directing the police to it Petitioner also acknowledged his knowing possession of the weapon. This knowing possession was, of course, the entire question at the heart of the case against Petitioner. The use in evidence of Petitioner's own words to convict him conclusively and irrevocably prejudiced his defense.

C. The Ineffectiveness -- Petitioner's counsel failed to file a motion to suppress his statements, disregarding the *Miranda* violation. Failure to file a motion to suppress may be ineffective assistance. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). It is, of course, not ineffective assistance *per se*. Rather, as one jurist has noted: "[W]here a suppression motion would be successful, an attorney is guilty of ineffective assistance if he does not file the motion on time. * * * Conversely, if such a motion would fail, counsel may not be criticized for having accurately assessed his client's chances of successfully challenging the warrant . * * * Thus, whether trial counsel * * * acted incompetently in not filing a timely motion to suppress depends upon the merits of the * * * question." *Washington v. United States*, 726 F.2d 1089, 1093-94 (6th Cir. 1984) (Contie, J., concurring) (so holding in context of 4th amendment suppression motion).

In other words, the merits of the *Miranda* claim are determinative of the ineffectiveness claim, and the ineffectiveness claim, in turn, cures the procedural default. Substantively, as to the simple *Miranda* issue presented by the Lt. Hutchinson's testimony recounting Petitioner's own statement, counsel's failure is difficult to understand. We respectfully submit that it was not objectively reasonable to fail to assert a Fifth Amendment defense to the admission of these

statements, which were the product of Petitioner's custodial interrogation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-7760

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

Versus

KEVIN E. BALL,

Defendant – Appellant .

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (CR-99-229; CA-02-229-2)

Argued: May 24, 2005 Decided: June 29, 2005

Before WILKINSON, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Paul Samuel Rosenzweig, Washington, D.C., for Appellant. Michael Lee Keller, Assistant United States

Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.
ON BRIEF: Thomas J. Gillooly, Charleston, West Virginia, for Appellant. Kasey Warner, United Stated Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

In an earlier appeal we affirmed Kevin E. Ball's conviction and sentence for possession of a firearm after conviction of a misdemeanor crime of domestic violence in violation of 18 U.S.C. §§ 922 (g)(9) and 924 (a)(2). See United States v. Ball, 7 Fed. Appr. 210 (4th Cir. 2001). Thereafter, Ball filed in the district court a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. The district court, after concluding that none of Ball's six grounds for relief had merit, entered an order denying his § 2255 motion. Ball filed a timely notice of appeal, and the district court granted a certificate of appealability on three issues: (1) whether Ball's Fifth Amendment rights were violated when he was questioned outside his home without benefit of warnings required by Miranda v. Arizona, 384 U.S. 436 (1966); (2) whether Ball's conviction violated the Ex Post Facto Clause, U.S. Const. art I, § 9, cl. 3; and (3) whether Ball received ineffective assistance of counsel because his trial counsel did not raise the Miranda issue. In reviewing these issues, we have considered the briefs, the joint appendix, and the arguments of counsel. Finding no error, we affirm on the reasoning of the district court. Ball v. United States, Civ. Action No. 2: 02-00229 (S.D. W. Va. Aug. 31, 2004).

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

KEVIN BALL,
Movant,

v. (CIVIL ACTION NO. 2:02-00229)
(Criminal No. 2:99-00229)

UNITED STATES OF AMERICA,
Respondent.

ORDER

The movant, Kevin Ball, now a former federal prisoner, was sentenced to a term of imprisonment of 24 months and a three-year term of supervised release on August 3, 2000. The movant's sentence was the result of his having been found guilty of one count of Possession of a Firearm After Conviction of a Misdemeanor of Domestic Violence in violation of 18 U.S.C. §§ 922 (g)(9) and 924 (a)(2). Movant's conviction and sentence were affirmed on appeal. United States v. Ball, 7 Fed. Appx. 210, 2001 WL 324624 (4th Cir. 2001). He filed his well-written Motion Under 28 U.S.C. § 2255 on March 13, 2002, by his counsel, Paul Rosenzweig and Thomas Gillooly.

In his motion movant contends as follows: (1) his conviction was based upon evidence introduced in violation of the Fifth Amendment consisting of (a) his statements given without Miranda warnings that the gun was in a dresser in his bedroom and (b) the gun itself; (2) he was convicted in violation of the provisions of 18 U.S.C. § 922(g)(9); (3) he was convicted in violation of the Due Process Clause of the Fifth Amendment's vagueness, notice and knowledge requirements; (4)he was convicted in violation of the Equal Protection Clause; (5) he was

convicted in violation of the Ex Post Facto Clause; and (6) he received ineffective assistance of counsel in violation of the Sixth Amendment.

This matter was referred to the United States Magistrate Judge Mary E. Stanley, who filed her Proposed Findings and Recommendation on November 13, 2002, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). Movant timely filed his objections on December 6, 2002, wherein he suggested, in connection with his argument that he was convicted in violation of the Ex Post Facto Clause, that the court stay the final resolution of the motion and hold the proceedings in abeyance pending decision by the United States Supreme Court in the case styled Smith v. Doe I, 538 U.S. 84 (2003). Doubtless because the Supreme Court's decision in Doe I is not helpful to movant's position, it has not been further mentioned by movant.

On April 28, 2003, movant filed, by counsel, his Supplemental Notice of Authority Relating to the Objections of Movant Kevin E. Ball to Proposed Findings and Recommendation, wherein he requested that the court await the United States Supreme Court's ruling in United States v. Pantane. That request is made in connection with his argument that his conviction was based upon evidence, the gun, that allegedly emanated from statements made by movement without benefit of required Miranda warnings and thus, it is claimed, the gun was "fruit of the poisonous tree" received in violation of the Fifth Amendment. On July 16, 2004, the court received correspondence from movant's counsel advising that the Patane case had been decided on June 28, 2004, in a manner adverse to the position advanced by the movant and that the § 2255 motion is now ripe for resolution. See United States v. Pantane, __ U.S. __, 124 S. Ct. 2620 (2004) (holding that pistol seized from home of felon-in-possession under arrest for violating a temporary restraining order was admissible where defendant, who had not been given Miranda warnings, when asked by the officer

about the pistol voluntarily made the statement that it was in his possession and where in his bedroom it could be found).

On July 11, 2003, movant also filed, by counsel, his Supplemental Notice of Authority Relating to the Objections of Movant Kevin E. Ball to Proposed Findings and Recommendation, wherein he notified the court that on June 26, 2003, the United States Supreme Court decided Stogner v. California, 539 U.S. 607 (2003). Movant contends that Stogner bears directly on his argument that he was convicted in violation of the Ex Post Facto Clause.

The court has reviewed the record in this proceeding and has determined de novo that the objections are without merit for the reasons set forth herein and as outlined in the Magistrate Judge's report of Proposed Findings and Recommendation, which is adopted.

Movant's first argument that his conviction was based upon the introduction of the gun in evidence in violation of the Fifth Amendment is groundless in view of Patane; and his companion contention that statements by the defendant about the gun in the absence of Miranda warnings were likewise inadmissible is without merit by virtue of procedural default for which cause is not shown. As to the latter, moreover, the defendant was not under arrest when his statements were made to his counsel could appropriately have concluded that he was not in custody either.

Movant's next contention that he is actually innocent of the offense charged under 18 U.S.C. § 922 (g)(9) has effectively been dealt with both at the trial level and, more particularly, by the Court of Appeals in direct appeal and need not be further addressed.

For the reasons assigned by the magistrate judge in her Proposed Findings and Recommendation, movant's third and fourth grounds, based on due process and equal protection, are, to the extent not already considered on direct

appeal, subject to the procedural default for which cause has not been shown, and movant's fifth ground involving the Ex Post Fact Clause has been considered at both the trial and the appellate level on direct appeal. Movant now cites to Stogner which simply holds that lifting the three-year bar of the statute of limitations on a class of crimes as to which the limitations period had run so that they again become prosecutable violates the Ex Post Facto Clause. Stogner lends no support to movant who, after having been convicted of a misdemeanor domestic violence offense prior to the enactment of § 922(g)(9), thereafter possessed a firearm in violation of that statute. As the Court of Appeals for the Fourth Circuit stated on direct appeal:

> Ball's argument is foreclosed by our decision in United States v. Mitchell, 209 F.3d 319, 322 (4th Cir.), cert. denied, 531 U.S. 849, 121 S.Ct. 123, 148 L. Ed.2d 78 (2000) ("It is immaterial that [defendant's] firearm purchase and domestic violence conviction occurred prior to §922(g)(9)'s enactment because the conduct prohibited by § 922(g)(9) is the possession of a firearm.").

United States v. Ball, 7 Fed. Appx. at 212. (emphasis in original).

As to movant's sixth ground of ineffective assistance of counsel, the magistrate judge for good and sufficient reason specified throughout her Proposed Findings and Recommendation properly concluded that the movant's counsel mounted a vigorous defense at trial and on appeal and performed well within the range of competence expected of a defense attorney in a criminal case.

It is accordingly ORDERED that the movant's motion pursuant to 28 U.S.C. Section 2255, which includes his request for an evidentiary hearing, be, and it hereby is, denied.

It is noted that movant has sixty days from the entry of this order in which to appeal the dismissal of his § 2255 motion and his resentencing. Failure within sixty days from this date to file with the Clerk of this court a notice of appeal of this order and the Judgment thereon or to file with the Clerk of the United States Court of Appeals for the Fourth Circuit a request for a certificate of appealability thereof will render this order and the Judgment thereon final and unappeable.

The Clerk is directed to forward copies of this order to the movant, all counsel of record and the United States Magistrate Judge.

/s/
JOHN T. COPENHAVER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

KEVIN E. BALL,
Movant,

v. (CRIMINAL NO. 2:99-00229-01)
(Civil Action No. 2:02-0229)

UNITED STATES OF AMERICA,
Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the court is Movant's Motion to Vacate, Set Aside, or Correct Sentence, filed pursuant to 28 U.S.C. § 2255, on March 13, 2002, ("Motion," docket sheet document # 81), and supported by an Appendix ("App.," # 82). The Motion was referred to this Magistrate Judge by Standing Order. The United States filed its Response ("Response," # 93), and Movant filed a Reply ("Reply," #96).

Movant, Kevin E. Ball, (hereinafter referred to as "Defendant"), has served a 24 month period of imprisonment, was released on March 18, 2002, and is currently serving a three year term of supervised release, upon his conviction by a jury of being a prohibited person in possession of a firearm, in violation of 18 U.S.C §§ 922(g) and 924(a)(2). The District Court also imposed a special assessment of $100.00. (Judgment in a Criminal Case, entered August 9, 2000, #59.) Defendant's direct appeal was unsuccessful. United States v. Ball, No. 00-4582, 7 Fed. Appx. 210, 2001 WL 324624 (4th Cir. Apr. 4, 2001), cert denied, 122 S. Ct. 226 (2001).

Defendant identifies the following grounds for relief:

A. Ground one: Mr. Ball was convicted based upon evidence and testimony introduced in violation of the Fifth Amendment.

B. Ground two: Mr. Ball was convicted in violation of the provisions of 18 U.S.C. § 922(g)(9).

C. Ground three: Mr. Ball was convicted in violation of the Due Process clause of the Fifth Amendment's vagueness, notice, and knowledge requirements.

D. Ground four: Mr. Ball was convicted in violation of the Equal Protection clause;

E. Ground five: Mr. Ball was convicted in violation of the Ex Post Facto clause; and

F. Ground six: Mr. Ball received ineffective assistance of counsel in violation of the Sixth Amendment.

(Motion, at 9).

The United States, in its Response, contends that Defendant has not demonstrated that he received constitutionally defective representation at any stage of the criminal proceedings, that the absence of any Miranda warnings in Defendant's case does not present a sufficient basis for collateral relief, that his challenge to the appropriate interpretation of 18 U.S.C. § 922(g)(9) constitutes an attempt to relitigate an issue fully resolved on direct appeal, that his due process challenges regarding the vagueness and innocent factual knowledge components of his statutory violation has likewise been procedurally defaulted, and his remaining

constitutional claim are also subject to clear procedural limitations.

Defendant's Reply relies, in large part, on his Motion, elaborates on his contention that he was denied effective assistance of counsel, and asserts that his Fifth Amendment privilege against self-incrimination was violated, and that his statutory interpretation and due process arguments are not procedurally barred.

The pertinent facts of Defendant's conviction are as follows: Kevin and Melinda Ball were married in 1987, and remained married through August 30, 1999, the date of the offence. On May 16, 1995, Defendant was arrested and charged with domestic battery of Melinda Ball, in violation of W. Va. Code § 61-2-28. There is some unresolved ambiguity whether Defendant was convicted of domestic battery or battery (W. Va. Code § 61-2-9). The conviction occurred in the Magistrate Court of Kanawha County, WV, which is not a court of record. After serving a period on probation, Defendant's handgun was returned to him March, 1996.

On September 30, 1996, Congress amended 18 U.S.C. §922 to prohibit the possession of a firearm by anyone "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. §922(g)(9) (West 2002).

On August 30, 1999, police were called to the Balls' residence to investigate a report that Defendant was drunk and had a handgun. After a period of time, police and Defendant's counselor convinced Defendant to exit the house without the gun; he told the police where the gun could be found and they retrieved it. Defendant was then charged and convicted for being a prohibited person in possession of a firearm.

Ground one – Fifth Amendment

Defendant contends that his Fifth Amendment privilege against self-incrimination was violated by the admission into evidence of (1) his statements to police officers, and (2) the handgun. Defendant argues that he was in custody when he exited his residence, that the officers did not give him Miranda[1] warnings, and that he made statements that should have been suppressed. Further, he asserts that his statements led police to recover the handgun from the residence, and that the gun is "fruit of the poisonous tree" and should have been suppressed. (Motion, at 10-16.)

Defendant concedes that this Fifth Amendment ground for relief was not raised during his trial or direct appeal, and is procedurally defaulted. Id., at 16-17. He contends, however, that he can demonstrate "cause and actual prejudice" for the default, namely ineffective assistance of counsel. Id. In the alternative, Defendant asserts that he is excused from showing cause because the legal basis for the claim was not reasonably available when the issue should have been raised, citing Dickerson v. United States, 530 U.S. 428 (2000). Id. at 17.

The United States argues, in response, that Defendant was not in custody; thus there was no Miranda violation in admitting his statements to police. Further, the United States contends that seizure of the gun was not fruit of the poisonous tree, relying on United States v. Sterling, 283 F. 3d 216 (4th Cir.), cert. denied, 122 S. Ct. 2606 (2002). (Response, at 9-11.)

Defendant's Reply asserts that his custodial statements without Miranda warnings were admitted into evidence in clear violation of his Fifth Amendment privilege against self-incrimination. (Reply, at 5-9.) Defendant concedes that he was in custody. Id., at 8.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

(1) Defendant's statements

Defense counsel did not file a motion to suppress Defendant's statements to police officers; he did, however, file a motion to suppress the handgun on the grounds that his consent to the search and seizure of the handgun was not voluntary (#19). The United States responded that the consent was voluntary (#22), and Defendant replied that his mental state, adversely affected by alcohol and drugs, was such as to make his consent involuntary (#26). The District Court conducted an evidentiary hearing on the motion to suppress, made findings of fact, and denied the motion. (Tr. Hrng. on Pretrial Motions, #33, at 128-33.)

The Fifth Amendment to the Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court adopted rules which must be followed during custodial interrogations to protect that right in Miranda v. Arizona, 384 U.S. 436 (1966). Miranda has become a constitutional rule which, in essence, makes the admissibility of such statements turn solely on whether they were made voluntarily. See Dickerson v. United States, 530 U.S. 428 (2000). Absent a formal arrest, Miranda warnings need be given only "where there has been such restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam). A person is in custody for the purpose of Miranda when, under the totality of the circumstances, "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

The determination of whether a person is in custody depends on the objective circumstances of the interrogation. Stansbury v. California, 511 U.S. 318 (1994)(per curiam). In Thompson v. Keohane, a habeas corpus case, the Supreme Court set forth the appropriate manner for resolving "in custody" determinations for Miranda purposes:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed , the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed.2d 1275 (1983)(per curiam)(quoting Mathiason, 429 U.S. at 495, 97 S. Ct. at 714). The first inquiry, all agree, is distinctly factual. State-court findings on these scene-and action-setting questions attract a presumption of correctness under 28 U.S.C. §2254(d). The second inquiry, however, calls for the application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact" qualifying for independent review.

Thompson v. Keohane, 516 U.S. 99, 112-13 (1995).

In United States v. Braxton, 112 F.3d 777, 780-81 (4th Cir. 1997), the Fourth Circuit addressed the voluntariness of a statement given without Miranda warnings:

> A statement is voluntary under the Fifth Amendment only if it is "involuntary" within the meaning of the Due Process Clause. [Citations omitted.] The test for determining whether a statement is voluntary under the Due Process

Clause "is whether the confession was 'extracted by any sort of threats or violence, [or]obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" [Citation omitted.] In Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 521, 93 L. Ed.2d 473 (1986), the Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."

The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary. The proper inquiry " is whether the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" [Citation omitted.] Any statement given freely and voluntarily without any compelling influences is admissible in evidence. * * *

To determine whether a defendant's will has been overborne or his capacity for self-determination critically impaired, courts must consider "the 'totality of the circumstances,' including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." [United States v. Pelton], 835 F. 2d [1067], 1071 [4th Cir. 1987)], (quoting United States v. Wertz,625 F. 2d 1128, 1134 (4th Cir. 1980); [other citations omitted].

There is no dispute that Defendant was not arrested and that he was not given Miranda warnings. Thus it is necessary to determine whether he was otherwise "in custody."

The District Court made findings of fact concerning the circumstances of the interrogation in the context of the voluntariness of Defendant's consent to the search of his residence. (Tr. Hrng. on Pretrial Motions, #33, at 128-33.) The court summarizes the findings as follows: On August 30, 1999, Defendant had a gun, pointed it in his own mouth, pointed it at his wife, and threatened to kill both of them. Defendant was drunk. When police arrive, he was asleep, and attempts to rouse him were unsuccessful. After an hour and a half, Defendant's counselor arrived and was able to establish contact. Defendant was given instructions on how and where to leave his residence, which he did not follow. After more contact by telephone, Defendant followed the instructions and walked about fifteen yards to a fence where police officers (in and out of uniform) and his counselor were waiting. The officers and the counselor entered the yard and sat with Defendant in lawn chairs on a patio near a porch. The police wanted two things: to get permission to enter the home to get the gun, and to inform Defendant that he had a choice of being arrested and jailed or going for treatment at a local hospital. At first Defendant resisted the suggestion that he leave for either destination. After twenty to thirty minutes, he gave permission to get the gun and told them where the gun was. One officer and the counselor went into the house, got the gun, and came out. Defendant then decided to go to a hospital for treatment, and he was promptly taken there. More than three hours after the incident began, Defendant's blood alcohol reading was .22, and his blood tested indicated that he had an opiate in his system. When he spoke with officers, he was "plainly intoxicated" and his speech was "to some extent slurred." Id., at 131. Defendant was never handcuffed; no weapons were drawn; cruisers were out of sight. He could stand and walk without assistance. He made no bizarre answers or statements. He told officers exactly where to find him the gun. Defendant made the choice to go to a hospital rather than to jail. As they were leaving, Defendant asked that his car be moved from the street to the garage.

In conclusion, the District Court found as follows:

> Under those circumstances, the court finds that the defendant was aware of the request being made of him, and certainly for purposes of giving consent to enter his home in order to retrieve the weapon, that he was in possession of his faculties to the extent that he could voluntarily, knowingly, and intelligently grant that consent and indeed did so.
>
> The court accordingly . . . concludes that the defendant's consen. was valid and that the officers fairly treated him and received his consent to obtain the weapon upon entering the house with the defendant's consent, and for that reason, the court concludes that the consent was, as stated, voluntarily, knowingly, and intelligently given, and the motion to suppress is denied.

Id., at 132-33.

At trial, Lieutenant Hutchison of the South Charleston Police Department testified as to his conversation with Defendant on August 30, 1999. The officer stated that he and Defendant discussed the firearm (without giving further details), that Defendant agreed to turn it over to the police, that Defendant gave permission for police to get the gun from the house, and that Defendant told him where it was. (Tr. Trial, Vol. I, # 69, at 95-96.) There was no other testimony by a police officer of a statement by Defendant. Defendant did not testify.

Defendant argues that his Miranda-based ground for relief is not procedurally defaulted because he was denied effective assistance of counsel. James M. Cagle, Esquire, a tenacious litigator with considerable experience in federal criminal cases, was retained to represent Defendant. In

addition to filing the motion to suppress the gun and briefing the voluntariness issue, he vigorously participated in an evidentiary hearing on the motion and preserved his objections to the evidence. Moreover, he raised the issue on direct appeal, albeit unsuccessfully. United States v. Ball, 2001 WL 324624 **2. The Fourth Circuit ruled that, "[b]ased on the totality of the circumstances, [citation omitted], there was sufficient evidence presented at the suppression hearing on which the district could base its finding that Ball voluntarily consented to the search. Id.

The Supreme Court addressed the right to effective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court adopted a two-pronged test for determining whether a defendant received adequate assistance of counsel. Id. The first prong is competence; movant must show that the representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-91. There is a strong presumption that the conduct of counsel was in the wide rang of what is considered reasonable professional assistance, and a reviewing courts must be highly deferential in scrutinizing the performance of counsel. 466 U.S. at 688-89.

In order to meet the first prong, movant

> must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

460 U.S. at 690.

The second prong is prejudice; "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. The court may determine the prejudice prong prior to considering the competency prong if it is easier to dispose of the claim on the ground of lack of prejudice. 466 U.S. 697.

Defendant's statements to the police concerning the gun, and his consent to the police retrieving the gun from his residence, are closely intertwined. While allegedly unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment, see Dickerson v. United States, 530 U.S. at 441, Defendant's constitutional rights were not violated in either instance. Mr. Cagle chose to litigate the voluntariness of Defendant's consent to the search and seizure of his gun pursuant to well-established Fourth Amendment standards, rather than the voluntariness of his contemporaneous statements. This is just the kind of strategic decision which should be reviewed with great deference.

This ground for relief by Defendant constitutes a questioning of trial strategy which the Supreme Court of the United States addressed in Strickland.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to
> second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S. Ct. 1558, 1574-1575, 71 L. Ed.2d 783 (1982). A fair assessment of attorney performance requires that

> every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955).

Strickland, 466 U.S. at 689.

The court proposes that the District Court find (1) that it was objectively reasonable for Mr. Cagle to pursue suppression of the gun itself, and not to seek suppression of Defendant's statement as to the gun's location, (2) that Mr. Cagle's conduct was well within the wide range of what is considered to be reasonable professional assistance, (3) that Defendant was not denied effective assistance of counsel with respect to the statements he made to police, and (4) that Defendant's ground for relief concerning those statements has been procedurally defaulted and may not be raised in this § Motion. In the alternative, the court proposes that the District Court find that Defendant was not in custody at the time he told police where his gun was located and that Defendant's statements were voluntary.

(2) The handgun

Defendant litigated the search and seizure of the gun at all stages of the case. He now argues that the gun was "fruit of the poisonous tree" due to the failure to give Miranda warnings, and that it should have been suppressed. In the meantime, however, the Fourth Circuit has issued its

decision in United States v. Sterling, 283 F. 3d 216, 218 (4th Cir.), cert denied, 122 S. Ct. 2606 (2002), which affirmed its holdings in United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), that "the 'fruits doctrine' is inapplicable in departures from Miranda." Accordingly, the court proposes that the District Court find that suppression of the handgun was not required as fruit of the poisonous tree.

Ground two – 18 U.S.C. § 922 (g)(9)

Defendant argues that his conviction was contrary to the language of 18 U.S.C. § 922(g)(9), based on his assertion that the predicate offense must be domestic battery, not battery on a domestic partner. (Motion, at 18-27.)

The government responds that Defendant litigated this issue thoroughly on direct appeal, citing Boeckenhaupt v. United States, 537 F.2d 1182 (4th Cir. 1976)(per curiam), that virtually all of existing case authority is contrary to his position, and that no case cited by Defendant supports his argument. (Response, at 11-12.)

In reply, Defendant argues that he is not procedurally barred from arguing his point, because he is "actually innocent" of violating 18 U.S.C. § 922(g)(9). (Reply, at 9-10.)

Defendant filed a motion to dismiss the indictment (#15), supported by a memorandum (#16) arguing that "there is no crime of 'domestic battery' within [W. Va. Code] Section 61-2-9." The government filed a memorandum in opposition (#25), and Defendant filed a reply (#27). At the hearing of pretrial motions, the presiding District Judge announced the court's ruling:

> Because the court concludes that the defendant's state misdemeanor conviction for assaulting his spouse, whether it's deemed to be under the general assault and battery statute or whether it's deemed to be under the particular statute that

> deals with domestic violence by a spouse, was a misdemeanor crime of domestic violence, and inasmuch as it is a misdemeanor crime of domestic violence for purposes of the offense charged in this case, the court denies the motion to dismiss.

(Tr. Hrng. on Pretrial Motions, #33, at 2.)

Defendant raised the issues on direct appeal. (Response, Ex. B.) The Fourth Circuit addressed this argument on direct appeal as follows:

> Assuming, as Ball contends, that he was convicted of simple battery under § 61-2-9 rather than domestic battery under W. Va. Code Ann. § 61-2-28 (Michie 2000), [FN1] we find that his conviction for simple battery meets the § 921 definition. Section 921(a)(33)(A) requires the predicate offense to have only one element- - the use or attempted use of physical force; the relationship between the perpetrator and victim need not appear in the formal definition of the predicate offense. United States v. Chavez, 204 F.3d 1305, 1313-14 (11th Cir. 2000); United States v. Meade, 175 F.3d 215, 218-2[illegible] (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 619-21 (8th Cir. 1999). Because Ball committed a battery against his wife, the district court did not err in finding, as a matter of law, that Ball had been convicted of a misdemeanor crime of domestic violence.
>
> FN1. There was some discrepancy in the record regarding under what section of the West Virginia Code Ball was convicted. Although the charging papers and guilty plea reflected that Ball pled guilty to domestic battery under § 61-2-28, the

> criminal case history referred to the conviction as simple battery under § 61-2-9.

United States v. Ball, 2001 WL 324624, **1-2.

In Boeckenhaupt, the Fourth Circuit ruled that "issues [which] have been previously decided by this court . . . will not be allowed to [be] recast under the guise of collateral attack." 537 F.2d at 1183. Defendant received full and fair consideration of his argument that statutory analysis of Section 922(g)(9) should result in a ruling that "misdemeanor crime of domestic violence" does not include the misdemeanor crime of battering one's wife. He argued the point before the District Court and the appeals court to no avail. To permit relitigation of the issue already decided would not further the purposes of Section 2255 and would result in wasteful duplication of the federal judicial review process. See United States v. Palumbo, 608 F.2d 529 (3d Cir. 1979).

The Palumbo decision held that there are four exceptions to the rule prohibiting relitigation of issues adjudicated at trial and on direct appeal: newly discovered evidence that could not reasonably have been presented at the original trial; a change in applicable law; incompetent prior representation by counsel; or other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims. 608 F.2d at 533. Defendant complains that his trial and appellate counsel did not raise the issue completely, and that he is free to raise the issue of statutory interpretation which renders him "actually innocent." (Motion, at 25-26.)

The Court proposes that the District Court find that Defendant's trial and appellate counsel did a competent job of presenting the statutory analysis argument, that Defendant has produced no good reason for not applying the Boeckenhaupt rule that he may not renew arguments

previously presented, considered and decided, and that Defendant is not "actually innocent."

Grounds three, four and five – Due Process, Equal Protection, and Ex Post Facto

a. Due Process

Defendant's arguments based on the Due Process Clause are that (1) Section 921 is unconstitutionally vague, (2) Section 922 failed to give him adequate notice of the criminality of his conduct, and (3) the United States should have been required to prove that Defendant had knowledge of the illegality of his conduct. (Motion, at 27.) He contends that his attorney was ineffective because he did not raise the vagueness and innocent factual knowledge grounds. Id., at 35.

The United States argues that the grounds have been procedurally defaulted by not being raised on direct appeal, or that Defendant has failed to show cause and actual prejudice to excuse his default.

Defendant replies that neither the due process/vagueness argument nor the knowledge of factual predicate argument was raised during his trial or appeal (thus demonstrating his attorney's ineffectiveness); he points out that the only due process argument which was litigated was whether the United States had to prove that Defendant knew that his conduct was illegal. (Reply, at 10.) He asserts that he was engaged in conduct that "he reasonably believed as wholly innocent and not subject to any criminal sanction." Id., at 11.

Prior to trial, Defendant filed a so-called "Alternative Motion to Dismiss," supported by a memorandum (##17, 18), which argued that the prosecution violated his right to due process of law because he was not given notice of the illegality of his conduct. The government responded (# 24),

and Defendant filed a reply (# 28). At the hearing on pretrial motions, the District Judge took the motion under advisement. (Tr. Hrng. on Pretrial Motions, # 33, at 2; Order entered March 22, 2000, # 30.) At the beginning of the trial, before commencing voir dire, the court ruled as follows:

> With respect to the defendant's alternative motion to dismiss, the United States Court of Appeals for the Fourth Circuit has in United States v. Mitchell [209 F.3d 319], decided March 27, 2000, involving circumstances similar to the case now before this court, concludes that a defendant charged with possession of a firearm following his conviction of a misdemeanor crime of domestic violence need not be shown to have known that his possession of a firearm was illegal; and further that his conviction for such an offense does not violate the ex post facto clause nor does it violate due process on the ground that the defendant did not have notice that his continued possession of the firearm was illegal.
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> In addition, the court concludes that Section 922(g)(9) is not a bill of attainder and thus does not violate the constitutional prohibition against bills of attainder. The court also concludes that Section 922(g)(9) does not infringe upon the Second Amendment right to keep and bear arms in that his possession of a firearm is not shown to bear any relationship to a well-regulated militia. Consequently, the defendant's alternative motion to dismiss is in all respects denied.

(Tr. Trial, Vol. I, # 69, at 8-9.) Defendant's brief in his direct appeal did not raise a due process argument. (Response, Ex. B.)

The Fourth Circuit's decision in Mitchell rejected that defendant's due process vagueness/lack of notice

arguments, holding that Section 922(g)(9) "made perfectly clear, however, that Mitchell's possession of the firearm was unlawful." 209 F.3d at 323. The Mitchell opinion also ruled that "ignorance of the law is no excuse," and held that the defendant is not entitled to any "particularized notice." Id. Defendant's due process arguments are variations on the theme of notice and knowledge. Whether couched in terms of vagueness, lack of notice, or knowledge, Defendant is asserting that his constitutional right to due process of law was violated because he did now know that it was unlawful for him to possess a firearm, even though he knew that he had been convicted of battering his wife. In Mitchell, the Court found such an argument unpersuasive. " 'engaging in abusive conduct toward [his wife and child, the defendant] removed himself from the class of ordinary citizens' to the point where he could not 'reasonably expect to be free from regulation when possessing a firearm.'" 209 F.3d at 323 (quoting United Sates v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999). Given the Mitchell decision, it is understandable that Defendant's attorney made the decision to present arguments which had not just been decided adversely to his client.

The court proposes that the District Court find that Defendant did not present an argument on direct appeal that his right to due process of law had been violated, and that his default is not excused by any cause, including the alleged ineffectiveness of his attorney.

b. Equal Protection

Defendant argues that "Section 922 also creates an unconstitutional distinction between those who have been convicted of felonies, and may have their right to possess a handgun restored, and those who have been convicted of misdemeanor offenses who may not have their rights restored. This arbitrary distinction violates the Equal Protection clause of the Constitution." (Motion, at 36.) He concedes that his attorney did not raise this claim and

suggests that the failure to do so constitutes ineffective assistance of counsel and cause to excuse the default. Id., at 38.

The government argues that "Defendant failed to raise the equal protection claim during the course of the direct criminal proceedings and he has offered no controlling authority that suggests the claim has now or had ever had the slightest significant validity." (Response, at 14-15.)

Defendant did not address this point in his Reply, and has cited no case which holds that Section 922(g)(9) does not have a rational basis for its disparate treatment of those convicted of any kind of felony (whether or not involving violence), and those convicted of battering a close family member.

The court proposes that the District Court find that Defendant's claim under the Equal Protection Clause was not raised at trial or on direct appeal and was procedurally defaulted. The District Court should further find that Defendant has failed to show cause for his procedural default.

c. Ex Post Facto

Defendant contends that Section 922(g)(9) violates the Ex Post Facto Clause of the Constitution because it increased the punishment he incurred when he was convicted of battery. (Motion, at 38.) He argues that "the law has changed in a manner that criminalized conduct that: a) he thought otherwise innocent; b) had been bargained for conduct as part of his plea agreement; and c) that he had presumed was lawful because it occurred with the facilitation of the South Charleston police."[2] Id., at 44. Defendant

[2] After Defendant served his period of probation for battery, the South Charleston Police Department returned his

concedes that this issue was litigated by trial and appellate counsel, but he claims that it was not raised sufficiently well. Id., at 44-45.

The United States relies on the prior consideration of the issue and the general rule that a defendant may not relitigate grounds which were addressed on direct appeal.

Defendant included an Ex Post Facto argument in his Alternative Motion to Dismiss (#18), and the District Court rejected that ground for dismissal. (Tr. Trial, Vol. I, #69, at 8.) He raised the matter on appeal, and the Fourth Circuit denied relief, relying on the Mitchell ruling, 209 F.3d at 322. ("It is immaterial that [defendant's] firearm purchases and domestic violence conviction occurred prior to § 922(g)(9)'s enactment because the conduct prohibited by § 922(g)(9) is the *possession* of a firearm.").

The court proposes that the District Court find that Defendant had full and fair consideration of his Ex Post Facto argument at trial and on direct appeal, and may not relitigate the issue on collateral review.

Ground six – Alleged Ineffective Assistance of Counsel

The court has already addressed the standard for review of an attorney's performance under the Sixth Amendment. Defendant contends that his attorney's errors consisted of failing (1) to raise or address the Miranda issue, (2) to make an extensive argument of statutory analysis of Section 922(g)(9), (3) to argue all three aspects of the Due Process ground for relief with thoroughness, and (4) to assert the issue of denial of equal protection of the law. The court has addressed each of these alleged errors in the context of each legal argument. The court proposes that the District

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handgun to him, approximately six months prior to the passage of Section 922(g)(9).

Court find that Mr. Cagle's arguments at trial and on direct appeal constituted a vigorous defense, and that he performed well within the wide range of competence expected of a defense attorney. The court proposes that the District Court find that Defendant was not denied effective assistance of counsel.

The court proposes that the District Court find that none of Defendant's grounds for relief had merit. It is respectfully **RECOMMENDED** that the District Court deny Defendant's § 2255 Motion, deny Defendant an evidentiary hearing, and dismiss this case from the docket.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable John T. Copenhaver, Jr. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), Rule 8(b) of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and Rule 45(e) of the Federal Rules of Criminal Procedure, the parties shall have three days (mailing/service) and then ten days (filing of objections), from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F. 2d 1363 (4th Cir. 1989); Thomas v. Arn , 474 U.S. 140 (1985); Wright v. Collins, 766 F. 2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, Judge Copenhaver, and this Magistrate Judge.

The Clerk is directed to file this Proposed Findings and Recommendation and to mail a copy of the same to Movant, Kevin E. Ball, to counsel of record, and to Judge Copenhaver.

_____/s/_____
Mary E. Stanley
United States Magistrate Judge